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No. 75-306

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

MICHAEL C. McCRARY, etc., *et al.*,

and

COLIN M. GONZALES, etc., *et al.*,

Petitioners,

v.

RUSSELL L. RUNYON, KATHERYNE E. RUNYON, d/b/a BOBBE'S PRIVATE SCHOOL,

and

FAIRFAX-BREWSTER SCHOOL, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS[1]

OPINIONS BELOW

The opinion of the court of appeals, sitting *en banc*, and its order amending the opinion (A. 4-34, 40-42)[2] are reported

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[1] Petitioners herein, in addition to Michael C. McCrary and Colin M. Gonzales, infants who sued through their respective parents, include their parents, Curtis L. McCrary and Sandra McCrary, and Raymond Gonzales and Margaret R. Gonzales.

By order of the Court, the instant case is consolidated with Nos. 75-62, 75-66 and 75-278. All four cases seek review of the same proceeding below.

[2] "A" refers to the single appendix. References preceding a semicolon are to findings of the courts below; those following are to the supporting evidence.

at 515 F.2d 1082. The memorandum opinion and order of the district court which issued July 27, 1973 (A. 133-142) is reported at 363 F. Supp. 1200. A memorandum opinion and order of the district court which issued April 16, 1973 (A. 119-120) is unreported.

JURISDICTION

The judgments of the court of appeals in the consolidated cases below (A. 35-39) were entered on April 15, 1975. Petitions for rehearing were denied by order of the court of appeals filed on May 29, 1975 (A. 40-42). The petition for a writ of certiorari in No. 306 was filed on August 27, 1975, and was granted on November 11, 1975. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether an award of attorneys' fees to petitioners is warranted in the circumstances of this case as part of the equitable remedy.

2. Whether a civil rights action brought under 42 U.S.C. Sec. 1981 is subject to Virginia's two-year statute of limitations applicable to an action based on physical or bodily injury, or whether such an action is more properly subject to the five-year limitations period generally applicable to a "personal action" which survives the death of a party.

STATUTES INVOLVED

42 U.S.C.

Sec. 1981.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

* * *

Sec. 1988.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

* * *

Virginia Code (1950)

Sec. 8-24. Of actions not before specified. – Every action for personal injuries shall be brought within two years next after the right to bring the same shall have accrued. Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party die it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued. The amendment extending the period within which an action for personal injuries may be brought under this section to two years, shall not apply to any cause of action arising prior to July one, nineteen hundred fifty-four.

Notwithstanding any other provision of law to the contrary, every action brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, shall be brought within one year next after the right to bring the same shall have accrued. (Code 1919, § 5818; 154, c. 589; 1973, c. 385.)

STATEMENT

This proceeding arises out of two cases that were consolidated in the district court and in the court of appeals. The plaintiffs in both cases are Negro children and their parents who seek relief for violation of their civil rights guaranteed by the Thirteenth Amendment to the Constitution, as implemented by 42 U.S.C. Sec. 1981. The courts below upheld plaintiffs' contentions that the defendant schools, Fairfax-Brewster School, Inc., and Russell L. Runyon and Katheryne E. Runyon, d/b/a Bobbe's Private School, violated plaintiffs' rights under 42 U.S.C. Sec. 1981 by denying admission to the two children, Colin M. Gonzales

and Michael C. McCrary because of their race or color. The relevant facts, as found by the district court and affirmed by the court of appeals, are as follows:

A. Fairfax-Brewster School – its racially discriminatory admission policy

Fairfax-Brewster School is located in Fairfax County, Virginia, where it operates a school program consisting of pre-primary through sixth grade, as well as a summer camp program (A. 7; 59). In the 1972-1973 academic year the school had an enrollment of 223, and in 1972 the camp enrollment was 236 (A. 134; 60). Fairfax-Brewster School does not receive governmental funds or assistance and is supported entirely by tuition paid by the families of students (A. 134). It solicits students by advertising in the Yellow Pages of the telephone directory and by direct mail advertising addressed to "Resident" at specified addresses (A. 7; 74, 176).

In early May 1969, Mr. and Mrs. Gonzales contacted Fairfax-Brewster about enrolling their son, Colin, age 5-1/2, in the school's summer day camp program and continuing in the first grade in the fall (A. 7; 176-177). The Gonzales' had learned of the school through its advertisement in the Yellow Pages, through an advertisement received in the mail, and from a friend whose son had attended the summer camp. Thereafter, the Gonzales' visited the school with Colin and were shown around (A. 7-8; 177-179). Being pleased with what they saw, the Gonzales' completed the application form for admission, and submitted it along

with a required medical certificate prepared by their doctor and a registration fee (A. 8; 180).[3]

On May 16, 1969, the medical certificate and fee were returned to the Gonzales' accompanied by a form letter stating that the school was "unable to accommodate the application." No further explanation was given (A. 8; 73). Mr. Gonzales then called the school and spoke to someone identified as Captain Stuart A. Reiss, Chairman of the Board.[4] In response to Mr. Gonzales' inquiry as to why his son's application was rejected, he was told "we are not integrated" (A. 8; 166, 210-211).

Fairfax-Brewster School's policy of excluding Negroes was corroborated by Mrs. Marjorie Bryant, who, in January 1972, telephoned the school about enrolling her 4-year-old son, Grady Bryant (A. 10; 221-222). When Mrs. Bryant indicated that her son was black, she was told he could not attend the school because of his race (A. 10; 222-223).

B. Bobbe's Private School – its racially discriminatory admission policy

Bobbe's Private School is located in Arlington County, Virginia, where it operates a school program consisting of pre-primary through second grade, as well as a summer camp program (A. 134; 258). The school's average enrollment is 200 pupils and the average camp enrollment is 100

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[3] The application form as well as the acceptance form used by the school specify in detail the terms of what is designated as the "Enrollment Contract" between the parties (A. 63-66, 70-72).

[4] Captain Reiss' son, Robert S. Reiss is Director of the school, and his daughter-in-law, Olga M. Reiss, is Registrar (A. 8; 239, 246).

(A. 134; 108, 112). Bobbe's School does not receive governmental funds or assistance and relies for funding entirely on tuition paid by the families of students (A. 134). The school advertises in the Yellow Pages of the telephone directory and also solicits students by direct mail advertising (A. 136; 212, 220-221, 223, 226-227).[5]

In mid-May 1969, subsequent to Colin Gonzales' rejection by Fairfax-Brewster School, Mr. Gonzales, responding to the advertisement of Bobbe's School in the classified directory, telephoned the school (A. 8; 212). Mr. Gonzales stated that he was interested in enrolling his son and in response to his inquiry as to whether the school was integrated was told by the spokesman that only members of the Caucasian race were accepted (A. 8; 212-213).

In August 1972, Mrs. Sandra McCrary, in response to the advertisement of Bobbe's School in the classified directory, telephoned the school about enrolling her 2-year old son, Michael, in the nursery school program (A. 8; 226-227). After first inquiring about the cost, the program, meals, transportation and facilities for "toilet training", she asked if the school was integrated (A. 8; 227). Upon receiving a negative reply, she asked if the school accepted black children. The answer again was "no" (A. 8; 227-228).

The policy of Bobbe's Private School of excluding blacks was corroborated by Mrs. Marjorie Bryant, who, in January 1972, after being turned away by Fairfax-Brewster School, called Bobbe's School about enrolling her 4-year-old son,

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[5] As part of enrolling a child in Bobbe's School completed application and medical forms must be furnished by the parents (A. 143, 148A).

Grady (A. 10; 223). When she indicated that her son was black, Mrs. Bryant was told he could not attend the school because of his race (A. 10; 224).

Similarly, Mr. Marshall Brooks, who works for the Navy Department and is Mrs. McCrary's supervisor, called Bobbe's School after he became aware of the pendency of this suit, to find out for himself about the school's policy (A. 10; 263-264). In a telephone conversation on May 31, 1973, with the school's superintendent, William C. Gates, Brooks asked whether the school was integrated (A. 10; 264-265). Upon receiving a negative response, Brooks further asked if blacks were admitted. He was told "no" (A. 10; 265).

C. Proceedings below

The district court concluded that Colin Gonzales and Michael McCrary were excluded from the schools and day camp operated by the defendants because they are black, and that the rights of the two children and their parents under 42 U.S.C. Sec. 1981, were thereby violated. The district court enjoined the defendants from continuing to discriminate concerning the admission of students on the basis of race. The court also awarded compensatory damages for the embarrassment, humiliation and mental anguish suffered by the plaintiffs, as well as attorneys' fees. Fairfax-Brewster School was ordered to pay $2,000 damages to Colin Gonzales and $1,000 attorneys' fees. Bobbe's School was ordered to pay $1,000 damages to Michael McCrary, $2,000 to his parents, and $500 to Colin Gonzales, as well as $1,000 attorneys' fees (A. 142). The court denied damages to Mr. and Mrs. Gonzales on the ground that their suit was filed three and one-half years after the discrimination against them occurred and that their claims for damages against the schools were therefore barred by Virginia's two-year statute of limitations. Sec. 8-24, Code of Virginia (1950) (A. 119-120).

The court of appeals, sitting *en banc* and with three judges dissenting, found "ample evidence" in the record to support the district court's findings that Colin Gonzales and Michael McCrary were excluded from the two schools on grounds of race (A. 10). The court of appeals also agreed with the district court's conclusion that plaintiff's rights under 42 U.S.C. Sec. 1981 were thereby violated. The court of appeals affirmed the district court's award of damages to the individual plaintiffs, as well as the denial of damages to Mr. and Mrs. Gonzales on the ground that their claim was barred by Virginia's two-year statute of limitations (A. 17-18, 41). Finally, the court of appeals, with three judges dissenting, reversed the district court's award of attorneys' fees to plaintiffs. The three judges dissenting on this issue would have affirmed the award of fees to plaintiffs under the "bad faith" exception to the general rule that such fees are not awarded to a prevailing litigant (A. 18-22, 24, 42). The dissenting judges felt that the award of fees was justified by the district court's finding that officials of the defendant schools did not testify truthfully concerning their discriminatory practices.

SUMMARY OF ARGUMENT

I.

By relying on witnesses who "did not truthfully recount under oath the facts of the case" (A. 24), the defendant schools sought to conceal their racially discriminatory conduct from the district court. Deception of this nature inevitably prolongs litigation and constitutes a fraud upon the court. Resort to such litigating tactics by the defendants should not be condoned, and warrants their being assessed with attorneys' fees under the "bad faith" exception to the rule generally observed by American courts that such fees are not awarded to a prevailing litigant.

Even apart from the untrue testimony of defendants' witnesses, racial discrimination itself has been recognized as a form of bad faith which justifies awarding attorneys' fees to the victim who is required as a result to undertake expensive litigation in order to vindicate his rights. The racial discrimination practiced by the defendant schools had no relevancy to their educational programs, and hence was completely irrational and without justification. Public policy in this country, as expressed both in judicial decisions and legislative enactments, condemns racial discrimination as being odious to the concept of freedom and equality which underlies our democratic institutions. Further, there can be no doubt that racial discrimination has an oppressive effect on its victims. This has been judicially recognized, and is also confirmed by studies showing the psychological and emotional injury that discrimination has caused American Negroes. Because of the inherently oppressive nature of racial discrimination, therefore, a litigant who establishes that he has been victimized by such conduct and that he is therefore entitled to judicial relief should be awarded attorneys' fees as part of his equitable remedy.

In addition to the equitable grounds for awarding attorneys' fees to plaintiffs in this case, a statutory basis also exists in 42 U.S.C. Sec. 1988. Both Sec. 1988 and Sec. 1981, upon which this suit is based, were part of the Civil Rights Act of 1866. Sec. 1988 is a uniquely broad commission to the federal courts in civil rights cases to adopt from the remedies employed elsewhere in federal or state law those provisions most suitable for effectuating the substantive rights guaranteed by Sec. 1981. Before looking to state laws, Sec. 1988 requires a court in a civil rights case to canvass federal laws for remedies which will most fully effectuate the substantive right at issue. Sec. 1981 is like the modern civil rights laws enacted over the past decade in that it is not self-

enforcing, but depends on private-citizen enforcement. In order for such enforcement to be effective, persons who are discriminated against must be encouraged to seek judicial relief, and both Congress and this Court have recognized that this purpose is served by allowing for recovery of attorneys' fees. Without the prospect of such awards few plaintiffs are in a position to undertake the often complex, prolonged and unpopular litigation that may be required to enforce the constitutional and statutory guarantees against discrimination. Since Congress has specifically provided in the modern civil rights laws for awards of attorneys' fees to the prevailing litigant, Sec. 1981 requires that such awards be included as part of the remedy available in Sec. 1981 suits.

II.

This the latest of a significant number of cases where the Fourth Circuit and the district courts in Virginia have erroneously interpreted that state's statute of limitations to hold that a two-year limitations period, rather than a five-year period, applies to actions brought under the Reconstruction civil rights laws. In holding that Mr. and Mrs. Gonzales' claims for damages were barred by Virginia's two-year statute of limitations the courts below not only misconstrued the terms of the statute, but gave it a reading contrary to that given in non-civil rights cases.

Since there is no federal statute of limitations applicable to this Sec. 1981 action, the appropriate period provided by state law is controlling. The courts below held that the case is controlled by the first sentence of Sec. 8-24 of the Virginia Code (1950) (*supra*, p. 4) which specifies a two-year limitations period for an action for "personal injuries." However, the history of that section, an earlier decision of the Fourth Circuit, as well as decisions of the Supreme Court of

Virginia indicate that the phrase "personal injuries" has reference to injuries of a physical or bodily nature. Obviously, the instant case is not a tort action seeking redress for "personal injuries," but rather, is an action seeking vindication of basic federal rights guaranteed by the Constitution and an Act of Congress.

It is clear, therefore, that this action falls within the second sentence of Sec. 8-24 of the Virginia Code, which applies to "[e]very personal action for which no limitation period is otherwise prescribed." An action falling within this category is subject to a five-year limitations period if it is "for a matter of such nature that in case a party die it can be brought by or against his representative" – in other words, if it is survivable. If a "personal action" is of a type which does not survive the death of one of the parties, the prescribed limitations period is one year. The Virginia courts follow the common law rule that in order to survive the death of a party an action must be based on injury to real or personal property, or grow out of violation of a contract right. There is authority for the view that a Sec. 1981 action is based on a violation of contract rights and hence, is survivable under common law principles. In that event the five-year limitations period contained in Sec. 8-24 should be applied. However, the decisions of this and other courts indicate that a Sec. 1981 action is survivable without regard to common law doctrine, because it involves fundamental federal rights. The common law rule abating an action on the death of a party is generally regarded as one of the "archaisms of the law," and therefore it has been held to have no application to an action such as this based on a federal statute. The federal civil rights laws, particularly, should be given a broad liberal interpretation and it would be inconsistent with the congressional purpose to allow their effectiveness to be circumscribed by the outmoded doctrine of non-

survival. Accordingly, Virginia's five-year period of limitations is applicable to this proceeding, and the Gonzales' claims for compensatory damages should not have been disallowed by the courts below.

ARGUMENT

I. AN AWARD OF ATTORNEYS' FEES TO PETITIONERS IS WARRANTED IN THE CIRCUMSTANCES OF THIS CASE AS PART OF THE EQUITABLE REMEDY.

The district court, as shown *supra*, pp. 8-9, awarded attorneys' fees to petitioners totalling $2,000, but this award was overturned by the court of appeals. Three of the appeals court judges dissented on the ground that the award of fees was warranted under the so-called "bad faith" exception to the American rule which ordinarily precludes awarding attorneys' fees to a prevailing litigant. The dissenters were of the opinion that the district court's award of fees was justified by that court's finding that the officials of the defendant schools "did not truthfully recount under oath the facts of the case" (A. 24). This conduct, the dissenters stated, constituted "bad faith" of a form "that can no more be tolerated than out-of-court bad faith" *(ibid.)*. In these circumstances, the dissenters concluded, the district court's award of attorneys' fees to plaintiffs was warranted on the basis of *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-259 (1975), where this Court reaffirmed the bad faith principle concerning awards of such fees.

The testimony concerning Fairfax-Brewster School's admission policies that the district court refused to credit was given by three witnesses – Captain Stuart Reiss, Chairman of the Board; his son, Robert Reiss, who is the school's Director; and Captain Reiss' daughter-in-law, Olga Reiss, who is the Registrar. All three of these individuals testified in detail

about the school's admission policies, stating that they had conferred together about Colin Gonzales' application for admission to the first grade and summer camp and that he had been rejected for lack of educational qualifications (A. 243-244, 247, 250-251). The district court found the testimony of the three witnesses to be "unbelievable," and concluded that the reason for Colin's rejection was his race (A. 135). The district court's rejection of the testimony of these witnesses was based both on its evaluation of their credibility, as well as the contrary credited testimony of Mr. Gonzales, as corroborated by Mrs. Gonzales, and the testimony of Mrs. Bryant, who testified that when she called Fairfax-Brewster School to inquire about its admission policies she was told that it would not accept blacks.

The admission policies of Bobbe's Private School were described by Superintendent William Gates, who denied that blacks were excluded (A. 258-259, 260, 261). The district court discredited Gates, and, relying on the contrary testimony of five witnesses, Mr. and Mrs. McCrary, Mr. Gonzales, Mrs. Bryant and Mr. Marshall Brooks, found that the school practiced racial discrimination (A. 136-137).

There are three compelling reasons for awarding attorneys' fees to plaintiffs in this case. They are each well grounded in legal authority and taken either separately or collectively, as we show below, they provide ample basis for such an award.

The first reason for an award of attorneys' fees is that expressed by the three dissenting judges of the court of appeals who felt that such an award was warranted because the defendants exhibited "bad faith in the conduct of the litigation" by relying on witnesses who did not testify truthfully. This Court indicated in the *Alyeska* case that bad faith in the con-

duct of litigation can be a proper basis for awarding attorneys' fees, citing as an example (421 U.S. at 259) the decision in *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946). In that case it was discovered that a judgment had been fraudulently obtained, and following an investigation and proceeding to invalidate it, the party that had obtained the judgment was assessed with costs, including attorneys fees. This Court affirmed, holding that an assessment of fees is proper when a court finds "that fraud has been practiced upon it, or that the very temple of justice has been defiled" 328 U.S. at 580. It cannot be doubted that the "temple of justice" was defiled in the instant case when the witnesses untruthfully testified that the defendants did not practice racial discrimination. By thus concealing the truth, defendants sought to deceive the court and thereby obtain a favorable ruling.[6] Clearly, such conduct should not be condoned, for the giving of false testimony with deceptive intent is "an unconscionable act," as the Seventh Circuit held in sustaining an award of attorneys' fees in *Skil Corporation v. Lucerne Products, Inc.*, 503 F.2d 745, 750, cert. denied, 420 U.S. 974.[7]

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[6] It is impossible to see how the untrue testimony given by the defense witnesses could have resulted from a failure of "perception or memory," as the court of appeals majority suggests (A. 19). These witnesses were the owners and managers of the schools in question and they knew whether the schools did or did not discriminate on the basis of race. They knew what the truth was and yet they consciously gave false testimony. This is far different than where a witness unintentionally gives false testimony as the result of faulty "perception or memory." Obviously, in such circumstances there is no bad faith warranting an assessment of attorneys' fees.

[7] As exemplified by the *Skil* case, a bad faith test is applied in determining when to award attorneys' fees under the patent laws which provide for their award to the prevailing party in "exceptional cases." 35 U.S.C. Sec. 285.

Accord: *First National Bank in Sioux Falls v. Dunham*, 471 F.2d 712, 713 (C.A. 8, 1973). Moreover, a party's reliance on witnesses who present false testimony will almost inevitably prolong litigation by making it more difficult for the opposing side to establish the truth, either by means of cross-examination or the introduction of rebuttal evidence. "Dilatory" and "vexatious" litigating tactics in themselves have been held to evidence bad faith and to afford a basis for awarding attorneys' fees. *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1309 (C.A. 2, 1973); *Kinnear-Weed Corporation v. Humble Oil & Refining Co.*, 441 F.2d 631, 636-637 (C.A. 5, 1971); *Thonen v. Jenkins*, 517 F.2d 3, 6 (C.A. 4, 1975).

It is particularly significant that the untrue testimony here was given in an effort to conceal defendants' racially discriminatory conduct, for racial discrimination has itself been expressly recognized as one of the manifestations of bad faith which justifies awarding fees to the victim who, in order to obtain redress, is required to undertake expensive litigation. In the *Aleyeska* case (421 U.S. at 258-259), this Court reaffirmed its earlier holding that an award of attorneys fees is appropriate "when the losing party has 'acted in bad faith, vexatiously wantonly, or for oppressive reasons . . .' " citing *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974). In the *Rich* case, and in other authorities relying on this definition of the bad faith principle[8] the cases cited as the basis for the statement invariably include *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473 (C.A. 4, 1951). *Rolax* is the only authority among those cited where a party's

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[8] See *Hall v. Cole*, 412 U.S. 1, 5 (1973); 6 Moore, Federal Practice Par. 54.77[2], p. 1709.

"oppressive" conduct was held to justify awarding attorneys' fees to the opposing side – the conduct at issue there being racial discrimination practiced by a labor organization toward its Negro members. In *Rolax* a distinguished panel of judges (Parker, Soper and Dobie, J.) held that because the plaintiffs had been subjected to "discriminatory and oppressive conduct" by the labor organization and were required to conduct expensive litigation to vindicate their rights, it was within the "power of equity" to award them counsel fees. 186 F. 2d at 481. Accord: *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962).

The court of appeals in *Rolax* referred to the racial discrimination practiced there as "obviously irrelevant and invidious." 186 F.2d at 478. The same characterization is equally applicable here, for the discrimination against Negro children practiced by the defendant schools is wholly irrelevant to the educational programs that they purport to provide. Hence, the discrimination practiced was irrational and without justification. These are factors warranting consideration by a court of equity relative to the question of attorneys' fees.[9]

The Fourth Circuit's description of racial discrimination as "oppressive" (*Rolax*, 186 F.2d at 481) reflects a view that parallels this Court's. For, "[o]ver the years this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'"

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[9] The mere fact that no court had held that racial discrimination by a private school was unlawful did not justify defendants' conduct. The belief that racially discriminatory is lawful does not excuse it if it is in fact proscribed, nor deprive the victim of appropriate redress. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422-423 (1975).

Loving v. Virginia, 388 U.S. 1, 11 (1967). Elimination of racial discrimination as it has been practiced in our society has been a major objective of governmental policies in recent years. Although racial discrimination still exists, it has fewer defenders than once was the case. Its destructive effect on social and economic institutions in the society is now widely recognized.[10] And there is no longer any doubt of the "oppressive" effect that it has on its victims. Numerous authorities attest to the psychological and emotional injury that discrimination has caused American Negroes.[11] In short, plaintiffs submit that the *Rolax* case, as it has been incorporated into, and become one of the bases for, the bad faith exception to the American rule regarding attorneys' fees provides ample support for awarding such fees to plaintiffs in this proceeding.[12]

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[10] For example, as this Court has noted, Title VII of the Civil Rights Act of 1964 (42 U.S.C. Secs. 2000e, *et seq.*) was enacted by Congress "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

[11] Proshansky and Newton, The Nature and Meaning of Negro Self-Identity (Ch. 5 in Deutch, Katz and Jenson, Social Class, Race and Psychological Development, 1968); Katz, Negro Performance in Interracial Situations (Ch. 11 in Watson, Psychology and Race, 1974). And see generally Wilcox, The Psychological Consequences of Being a Black American: A Sourcebook of Research by Black Psychologists (1971); Coles, Children of Crisis (1967).

[12] If the instant case, because it is based on racial discrimination, is held to be like *Rolax*, an award of attorneys fees to plaintiffs covering the trial as well as each succeeding stage of the proceeding would be warranted. *Rock v. Norfolk and Western Ry Co.*, 473 F.2d 1344, 1350 (C.A. 4, 1973), cert. denied, 412 U.S. 933; *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 455 (C.A. 5, 1973); *Reed v. Arlington Hotel*

(continued)

As further ground for their contention that they should be awarded attorneys' fees, plaintiffs refer the Court's attention to a statutory provision which, they submit, provides authority for an award of significant fees in an action to enforce the rights guaranteed by 42 U.S.C. Sec. 1981.[13] Although Sec. 1981 contains no reference to remedies, 42 U.S.C. Sec. 1988, *supra*, p. 3, does.[14] Sec. 1988 embodies a uniquely broad commission to the federal courts to search among federal and state statutes and common law for the remedial devices and procedures which best enforce the sub-

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[12] (continued) *Co.*, 476 F.2d 721, 726 (C.A. 8, 1973), cert. denied, 414 U.S. 854. On the other hand, if the untrue testimony of their witnesses is held to constitute the only manifestation of defendants bad faith, a court might consider itself obliged to limit attorneys' fees to the trial. Significantly, however, defendants' appeals were devoted in large part to efforts to overturn the trial court's credibility determinations. Cf. *Wright v. Jackson*, 522 F.2d 955 (C.A. 4, 1975).

It might be noted that the services of counsel have been provided for plaintiffs in this litigation through the Washington Lawyers' Committee for Civil Rights Under Law. The important role played by this and similar organizations in helping persons unable to afford legal representation to obtain vindication of their civil rights has been recognized in numerous instances. *Fairley v. Patterson*, 493 F.2d 598, 606-607 (C.A. 5, 1974); *Thompson v. Madison County Board of Education*, 496 F.2d 682, 689 (C.A. 5, 1974); *Hairston v. R & R Apartments*, 510 F.2d 1090, 1092 (C.A 7, 1975); *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 517 F.2d 1141, 1146-1148 (C.A. 4, 1975).

[13] In *Alyeska* (421 U.S. at 255-256) the Court concluded that 28 U.S.C. Sec. 1923 limits to a nominal amount the size of attorneys fees that can be awarded by a federal court in the absence of express statutory authority. In an action such as this the limit would appear to be $20, 28 U.S.C. Sec. 1923(a).

[14] Both sections were originally part of the same statute – the Civil Rights Act of 1866, Sections 1 and 3, respectively.

stantive provisions of Sec. 1981 and other civil rights statutes. *Moor v. County of Alameda*, 411 U.S. 693, 703 (1973).

The Congress which framed Sec. 1988 had little experience in fashioning statutory remedies for federal substantive rights in general and no experience with enforcing the rights originating in the newly adopted Thirteenth Amendment. Sec. 1988 granted authority to the courts in civil right cases to adopt from the remedies employed elsewhere in federal or state law those provisions most suited to providing full and effective relief. Cf. *Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 418. Applied to a Sec. 1981 action, Sec. 1988 requires, first, that a review be made of relevant "laws of the United States" to determine whether any contain a remedy which, if applied to the case at hand, would be "suitable to carry . . . into effect" the civil right at issue. Sec. 1988 does not require looking to laws that are literally applicable; such a command would be superfluous. Rather, the provision speaks more broadly of a court's exercising its powers in civil rights cases "in conformity" with other laws – a phrase which contemplates the adoption of remedies even from other areas of the law. The rule of decision is thus to be chosen, not according to what provision is technically applicable, but according to what remedy will most fully effectuate the substantive right at issue.[15]

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[15] Congressman Wilson, who sponsored Sec. 1988, contemplated that remedies might be adapted from the Fugitive Slave Act. 36 Cong. Globe, 39th Cong., 1st Sess., 1118 (1866). Sec. 1988 was described in *Tennessee v. Davis*, 100 U.S. 257, 299 (1880) as "no more than a direction to a judge sitting in such a [civil rights] case to conduct the same as well as he can." Congressman Kerr, in opposing the adoption of Section 1988, urged (36 Cong. Globe, 39th Cong., 1st Sess. 1271 (1866):

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If no suitable remedy can be adapted from federal law, Sec. 1988 calls for a similar inquiry to be made among the laws of the state where the court is situated.

Both Sec. 1981, which was adopted by Congress in 1866, and the modern civil rights laws enacted over the past decade, in addition to having the common objective of proscribing invidious discrimination, are also alike in their dependence on private-citizen enforcement of the fundamental rights involved. Both Congress and this Court have recognized that in order for civil rights legislation of this type to be effective there must be vigorous private enforcement with remedies which include provision for the recovery of attorneys' fees. Awards of attorneys' fees are needed "to encourage individuals injured by racial discrimination to seek judicial relief." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). Without the prospect of such awards few plaintiffs would be willing or able to handle the often complex, prolonged and unpopular litigation that may be required to enforce the constitutional and statutory guarantees against discrimination *Ibid.* While awards of counsel fees may remain the exception in other areas of the law,

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15 (continued)

> [T]he things attempted to be prohibited [by Secs. 1981-1982] are in themselves so extraordinary and anomolous, so unlike anything ever attempted before by the Federal Government, that the authors feared, very properly too, that the system of laws heretofore administered in the Federal courts might fail to supply any precedent to guide the courts in the enforcement of the strange provisions in this bill, and not to be thwarted by this difficulty, they confer upon the courts the power of judicial legislation, the power to make such other laws as they may think necessary.

these considerations have prompted Congress to expressly mandate such awards in the principal civil rights measures that it has enacted in the past decade.[16]

Accordingly, in the inquiry required by Sec. 1988 for the most suitable remedies to be applied in Sec. 1981 actions, it is appropriate, if not necessary, that these recent expressions of congressional intent be heeded. Since attorney fee awards have been made a conventional remedy available generally under civil rights legislation, Sec. 1988 requires the courts to apply the same remedy in Sec. 1981 actions. It is difficult to see how any other construction of Sec. 1988 is possible. Cf. *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (C.A. 5, 1971).

II. A CIVIL RIGHTS ACTION BROUGHT UNDER 42 U.S.C. SEC. 1981 IS NOT SUBJECT TO VIRGINIA'S TWO-YEAR STATUTE OF LIMITATIONS APPLICABLE TO AN ACTION BASED ON PHYSICAL OR BODILY INJURY, BUT RATHER IS SUBJECT TO THE FIVE-YEAR LIMITATIONS PERIOD GENERALLY APPLICABLE TO A "PERSONAL ACTION" WHICH SURVIVES THE DEATH OF A PARTY

As shown in the Statement, although the courts below held that the plaintiffs were entitled to recover compensatory damages from the defendants, Mr. and Mrs. Gonzales' claims were denied on the ground that they were barred by Virginia's two-year statute of limitations applicable to actions for "personal injuries." Sec. 8-24, Code of Virginia (1950). The

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[16] See, *e.g.*, 42 U.S.C. Sec. 2000a-3(b) (public accommodations); 42 U.S.C. Sec. 2000e-5(k) (employment); 42 U.S.C. Sec. 3612(c) (housing); Public Law 94-73, 94th Cong. 1st Sess. (1975) Sec. 402 (voting); 20 U.S.C. Sec. 1617 (education).

court of appeals held that the Gonzales' claims were "entirely referrable to injured feelings and humiliation" (A. 41) and that it regarded "such claims asserted under the Reconstruction Acts to be governed by Virginia's two-year statute," citing, *Almond v. Kent*, 459 F.2d 200, 203-204 (C.A. 4, 1972); *Allen v. Gifford*, 462 F.2d 615 (C.A. 4, 1972), cert. denied, *sub nom., Gifford v. Allen*, 409 U.S. 876. Plaintiffs submit that the court of appeals erroneously resolved the statute of limitations issue in this case and that, for reasons shown herein, the Gonzales' damage claims should have been allowed because, although their suit was filed three and one-half years after the discrimination against them occurred, it was within the five-year limitations period generally, applicable under Virginia law to actions of this nature.

As a threshold matter, the court of appeals was mistaken in characterizing this action as one "entirely referrable to injured feelings and humiliation." This description is not only a distortion of the purpose of the suit, but it demeans the fundamental constitutional rights that are at issue. By bringing this action, plaintiffs set out to vindicate for themselves and other Negroes basic federal rights that are guaranteed them by the Thirteenth Amendment as implemented by an Act of Congress. Plaintiffs asked for declaratory and equitable relief, as well as damages. Far more was at stake than merely their desire to obtain redress for "injured feelings and humiliation." In any event, even if that were an accurate characterization of their claims, the court of appeals nevertheless erred in deciding the limitations issue as it did, for, as shown below, the court's decision is not only based on a misinterpretation of the Virginia statute of limitations but, in addition, the decision squarely conflicts with an earlier ruling by the court of appeals interpreting the same statute in a non-civil rights case.

This actually is only the latest in what has become a significant number of cases where the Fourth Circuit, as well as the district courts in Virginia, have applied the wrong provision of that state's statute of limitations to suits brought under the Reconstruction statutes – Secs. 1981, 1982 and 1983 of Title 42, U.S.C.[17] In each of these cases the courts, following the precedent of *Almond v. Kent*, *supra*, have erroneously applied a two-year limitations period to actions which, under a proper interpretation of Virginia law, are governed by a five-year limitations period. In *Almond* the court of appeals correctly noted that where Congress enacts a statute authorizing a cause of action, but does not specify a limitations period, the "federal courts follow the limitations period fixed by the law of the state in which the district court is held." 459 F.2d at 203. Since Sec. 1981, on which the instant case is based, does not contain a limitations period and there is no other relevant federal statute of limitations, the appropriate period provided by state law is controlling. *O'Sullivan v. Felix*, 233 U.S. 318 (1914); *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 701-704 (1966). Though *Almond* arose under Sec. 1983 of the Civil Rights Acts, while the instant case is a suit under Sec. 1981, the Fourth Circuit ruled in both instances that the 'actions were

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[17] See *Almond v. Kent*, *supra*, 459 F.2d at 203-204; *Allen v. Gifford*, *supra*, 462 F.2d 615; *Revere v. Tidewater Telephone Co.*, 6 FEP Cases 891, 892 (C.A. 4, 1973); *Sitwell v. Burnette*, 349 F. Supp. 83, 85-86 (W.D. Va., 1972); *Landman v. Brown*, 350 F. Supp. 303, 306 (E.D. Va., 1972); *Landman v. Royster*, 354 F. Supp. 1302, 1314 (E.D. Va., 1973); *Taliaferro v. State Council of Higher Education*, 372 F. Supp. 1378, 1383 (E.D. Va., 1974); *Cradle v. Superintendent, Correctional Field Unit #7*, 374 F. Supp. 435, 437, n. 3 (W.D. Va., 1973); *Wilkinson v. Hamel*, 381 F. Supp. 768, 769 (W.D. Va., 1974); *Edgerton v. Puckett*, 391 F. Supp. 463 (W.D. Va., 1975); *Van Horn v. Lukhardt*, 392 F. Supp. 384, 391 (E.D. Va., 1975).

for "personal injuries" and hence were governed by the two-year limitations period contained in Section 8-24 of the Virginia Code. Further, while it is true that in *Almond* the plaintiff alleged that he had been beaten by the police with resulting physical injuries, the court of appeals did not limit its decision to Sec. 1983 actions where there are physical injuries, but rather held that the two-year limitations period "applies generally to Sec. 1983 suits." 459 F.2d at 204.[18]

The first sentence of Section 8-24, which sets forth the two-year limitations period applicable to actions for "personal injuries," was added by an amendment to that section in 1954. Va. Acts 1954, ch. 589. Prior to that time, such suits were governed by the limitations periods now contained in the second sentence of the section which is applicable to "[e]very personal action, for which no limitation is otherwise prescribed." See *Herndon v. Wickham*, 108 Va. 824, 97 S.E.2d 5, 7-8 (1957). The 1954 amendment did not change this general catch-all provision. It continues to specify a five-year limitations period for a "personal action" which survives the death of a party, and a one-year period for one that does not.[19] The only effect of the 1954

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[18] It should be noted that the last sentence of Section 8-24 is an amendment adopted by the Virginia General Assembly subsequent to the *Almond* decision, which purports to shorten the limitations period for Sec. 1983 actions from two years to one year. Va. Acts 1973, ch. 385. The amendment has been ruled unconstitutionally discriminatory by two district courts, so the two-year rule mandated by *Almond* is still applied to Sec. 1983 actions. See *Edgerton v. Puckett*, *supra*, 391 F. Supp. 463 (W.D. Va. 1975); *Van Horn v. Luckhardt*, *supra*, 392 F. Supp. 384 (E.D. Va., 1975).

[19] The question of survivability of actions is discussed *infra*, pp. 28-31.

amendment was to prescribe a limitations period of two years for a single category of tort actions – those involving "personal injuries." Both the statutory history and the context in which the phrase "personal injuries" is used indicate that it must have reference to injuries of a physical or bodily nature. Indeed, this common-sense interpretation of the statute was followed by the Fourth Circuit in a non-civil rights case, *Griggs v. Farmer*, 430 F.2d 638 (1970), aff'g., 314 F. Supp. 1185 (E.D. Va., 1969), where the court held the first sentence of Section 8-24 with its two-year limitations period to be applicable to an action based on physical assault with resulting tortious bodily injury, whereas the catch-all provision in the second sentence was held to apply to a cause of action alleging breach of promise to marry with resulting mental anguish and humiliation. Decisions of the Supreme Court of Virginia similarly confirm the view that the two-year limitations period in Section 8-24 is meant to apply only to actions based on physical injury. See *Carva Food Corporation v. Dawley*, 202 Va. 543, 118 S.E.2d 664 (1961); *Travelers Insurance Company v. Turner*, 211 Va. 552, 178 S.E.2d 503 (1971); *Burton v. Terrell*, 368 F. Supp. 553, 557 (W.D. Va., 1973), and cases cited.

Since it is clear that the case at bar is not an action for "personal injuries" within the meaning of the first sentence of Section 8-24 of the Virginia Code, it becomes necessary to look to the second sentence of the section which applies to "[e]very personal action for which no limitation period is otherwise prescribed."[20] The sentence specifies

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[20] The only other limitations provision of the Virginia statutes which might arguably apply here is Section 8-13 which prescribes limitations periods for actions based on contract – five years in the case of a written contract. An action to obtain specific performance of a contract is governed by Section 8-13. *Chesapeake & Ohio Railway Co.*

(continued)

that an action falling within this category is subject to a five-year limitations period if it is "for a matter of such nature that in case a party die it can be brought by or against his representative." Whereas if it is "for a matter not of such nature" – in other words, if it is an action that does not survive the death of one of the parties, either the plaintiff or defendant – the prescribed limitations period is one year. In *Almond v. Kent* the court of appeals properly observed that in an action seeking redress for violation of constitutional rights the "right of recovery depends upon federal considerations, and is not one which is concerned with the archaic concepts of survivability of the common law." 459 F.2d at 204. Although the court's observation was correct, it followed it up with the wrong conclusion for, as we have seen, it proceeded to characterize such an action as one for "personal injuries," and thereby do violence to both the common-sense and judicial construction of that statutory term.

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[20] (continued) *v. Willis*, 200 Va. 299, 105 S.E.2d 833 (1958). Although the court of appeals in the instant case rejected plaintiffs' alternative contention that since these actions involve written contracts (A. 63-66, 70-72, 143, 148A), the five-year limitations period contained in Section 8-13 is applicable, there is respectable authority for the view that because it is "the right to 'make and enforce contracts' which is protected by Sec. 1981," the most analogous state limitation period is contained in statutory provisions applicable to contracts. *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017 (C.A. 5, 1971); *Green v. McDonnell Aircraft Corporation*, 463 F.2d 337, 340 (C. A. 8, 1971), rev'd on other grounds, 411 U.S. 792; *Page v. Curtiss-Wright Corp.*, 332 F. Supp. 1060, 1064-1065 (D. N.J., 1971); *Sims v. Order of United Commercial Travelers of America*, 343 F. Supp. 112, 115 (D. Mass., 1972); *Dudley v. Textron, Inc.*, 386 F. Supp. 602, 606-607 (E.D. Pa., 1974); and see *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 994, n. 28 (C.A.D.C., 1973).

The Supreme Court of Virginia follows the common law rule that in order to survive the death of one of the parties an action must be based on injury to real or personal property, or grow out of violation of contract rights, but actions for personal injury apart from property or contract, do not survive. *Carva Food Corporation v. Dawley, supra*, 202 Va. 543, 118 S.E.2d at 667. See also, *Herndon v. Wickham, supra*, 108 Va. 824, 97 S.E.2d at 7-11; *Sherley v. Lotz*, 200 Va. 173, 104 S.E.2d 795, 799 (1958). There are many reported decisions reflecting efforts by the Virginia Court to differentiate between actions that survive and those that do not, but no case sheds any light on whether actions such as those authorized by the Reconstruction Acts might survive. Since the instant action brought under Sec. 1981 is analogous to a suit based on non-performance of a contract, it is arguably survivable under common law principles and hence would be subject to the five-year limitations period in Section 8-24 of the Code.[21] No effort was made, however, by the courts below to apply the intricacies of common law survivorship doctrine to the instant case, since by virtue of the decision in *Almond v. Kent*, which requires application of the two-year limitations provision, a federal court in Virginia does not reach that issue.

Nevertheless, if Section 8-24 is properly interpreted and a federal civil rights action is viewed, as petitioners urge, as an action falling within the second sentence of Section 8-24, there is still no need for a federal court to grapple with the complex principles of common law survivorship. For this "archaic" doctrine, as the Fourth Circuit recognized in *Almond*, is not applicable to an action based upon "federal

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[21] See cases cited *supra*, pp. 26-27, n. 20.

considerations." 459 F.2d at 204. The Fourth Circuit's conclusion in this regard fully accords with the teachings of this Court, for it has repeatedly overruled efforts to limit the effectiveness of congressional enactments by application of the common law doctrine of survivorship. As the Court stated in *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 350-351 (1937), the common law rule abating an action on the death of one of the parties is one of the "archaisms of the law" and is "a policy which has now had its day." Accordingly, the Court in *Van Beeck*, as well as subsequent cases has sought to give a broad liberal effect to federal statutes by finding a way to effectuate their purposes notwithstanding any impediment created by the outmoded doctrine of non-survival. *Just v. Chambers*, 312 U.S. 383 (1941); *Cox v. Roth*, 348 U.S. 207 (1955); *Moragne v. States Marine Lines*, 398 U.S. 375 (1970); *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974). Lower courts also, seeking to avoid the "extreme harshness" (*Cox v. Roth, supra*, 348 U.S. at 210) of the common law rule abating an action on the death of a party, have relied on this Court's decisions and enactments by Congress as evidence of a federal rule favoring survival where federal interests are at stake. See, *e.g.*, *Dellaripa v. New York, New Haven & Hartford R. Co.*, 257 F.2d 733 (C.A. 2, 1958); *Sands v. Abelli*, 290 F. Supp. 677, 681 (S.D. N.Y., 1968).

Because the Reconstruction statutes were enacted by Congress for the purpose of providing direct and expedient implementation of constitutional rights, the courts have shown particular concern last their effectiveness be diminished by survivorship rules. Thus, in *Brazier v. Cherry*, 293 F.2d 401 (C.A. 5, 1961), cert. denied, 368 U.S. 921, the court held that an action brought under 42 U.S.C. Sec. 1983 seeking damages for injuries sustained as a result of police misconduct could be maintained by the survivors of the victim

who died as a result of the injuries. Rejecting the contention that the action was not maintainable because of the common law rule of abatement, the Court stated that application of the rule "flies in the face of the express congressional purpose to provide for protection of citizens against unconstitutional deprivation of their fundamental civil rights." 293 F.2d at 406. *Pritchard v. Smith*, 289 F.2d 153 (C.A. 8, 1961) similarly was a suit brought under Sec. 1983 alleging misconduct by a police officer. Although the officer died after the proceeding was commcned, the court rejected the contention that this abated the action, concluding from a review of the decisions of this Court that there is "a strong trend to construe [federal] statutes liberally to allow the survival of tort actions." 289 F. 2d at 157. Accord: *Hall v. Wooton*, 506 F.2d 564 (C.A. 6, 1974).

The courts in the *Brazier*, *Pritchard* and *Hall* cases just described each discerned a federal doctrine of survivability, but since there was no relevant federal statute on the subject they turned to the survival statutes of the states where the causes arose to justify their decisions. In so doing, the courts relied for support on the language of 42 U.S.C. Sec. 1988 (*supra*, p. 3) which provides that in giving effect to the Reconstruction Acts if federal courts find that federal law fails to provide suitable remedies the courts are to utilize remedies provided by state law. Nevertheless, reliance by those courts on Section 1988 was recently criticized as being "unnecessary" and "inapt" by the Seventh Circuit which observed that the result reached in those cases "has firm basis in federal law and policy quite apart from Section 1988." *Baker v. F & F Investment Co.*, 420 F.2d 1191, 1196, n. 7 (1970). Likewise, another court, after an exhaustive review of the relevant authorities recently held that a Sec. 1983 action did not abate on the death of the defendant public official, even in the

absence of a state survival statute, because, the court concluded, there is "a federal common law of survival in civil rights cases in favor of the personal representative of the deceased." *Shaw v. Garrison*, 391 F. Supp. 1353, 1368 (E.D. La., 1975). As the Court stated, "such a holding seems required by the policies underlying the civil rights laws and the Supreme Court's treatment of survival actions in analogous contexts" *Ibid.*

For the reasons given, petitioners submit that Virginia's five-year period of limitations is applicable to the instant proceeding and that Mr. and Mrs. Gonzales' claims for compensatory damages should not have been deemed time-barred by the courts below.

CONCLUSION

For the foregoing reasons, plaintiffs submit that this proceeding should be remanded to the district court with instructions that the court award attorneys' fees to plaintiffs covering the total time that their attorneys have spent on the case and, in addition, that the Court award compensatory damages to Raymond Gonzales and Margaret R. Gonzales for the embarrassment, humiliation and mental anguish that they suffered as a result of defendants' discrimination against them.

Respectfully submitted,

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